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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL TRADE COMMISSION, ET AL., PETITIONERS

v.

GROLIER INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), exempts from mandatory disclosure the work-product of government attorneys when the litigation for which the material was prepared has ended and the government cannot demonstrate that related litigation exists or potentially exists.

PARTIES TO THE PROCEEDING

The parties in the court of appeals, in addition to those named in the caption, were the members of the Federal Trade Commission. At present, the members of the Commission are James C. Miller, III, Chairman, and Michael Pertschuk, David M. Clanton, and Patricia P. Bailey, Commissioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 671 F.2d 553. The opinion of the district court (App. E, *infra*, 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1982 (App. B, *infra*, 15a) and a timely petition for rehearing was denied on April 7, 1982 (Apps. C and D, *infra*, 16a, 19a). By orders of June 29, 1982 and August 3, 1982, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Subsection (a)(3) of the Freedom of Information Act, 5 U.S.C. 552(a)(3), provides:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its actions.

Subsection (b)(5) of the Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

This Freedom of Information Act ("FOIA") suit arose out of a request by respondent Grolier Incorporated for documents of the Federal Trade Commission ("FTC") concerning, among other things, a covert investigation by the FTC of one of Grolier's subsidiaries, the Americana Corporation (App. A, *infra*, 1a).[1] Americana had been the defendant in a civil penalty action filed by the Department of Justice in 1972 (*United States* v. *Americana Corp.*, Civil No. 388-72 (D.N.J.)) (App. A, *infra*, 1a).[2] The FTC complied in part with the FOIA request, but it withheld part or all of seven documents relating to the investigation of Americana. Grolier then brought suit in the United States District Court for the District of Columbia to compel release of those documents.

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[1] In addition to records relating to the Americana investigation ("Category A" records), Grolier also requested records relating to covert investigations of any of its 14 subsidiaries ("Category B" records) and records relating to covert investigations of any related person, company or entity ("Category C" records). However, Grolier's district court complaint was confined to Category A and B records, and Grolier later withdrew any claim for further disclosure of Category B documents. Thus, Grolier's appeal involved only Category A records. See Appellant's Opening Brief at 2 n.1.

[2] The civil penalty action was based upon an alleged violation of a 1949 cease and desist order prohibiting misrepresentations in door-to-door sales and false advertising. It was dismissed with prejudice in 1976 after the Commission declined to comply with a district court order directing it to turn over certain documents to the defendant (App. A, *infra*, 2a).

The FTC contended that certain of the documents,[3] including the four still at issue (*i.e.*, Numbers 3, 5, 6, and 7), fell within Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), because they were work-product compiled by FTC attorneys in anticipation of the civil penalty action against Americana and therefore would normally be privileged in the civil discovery context. Because Exemption 5 "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)), the FTC maintained that the documents sought by Grolier were exempt from disclosure.

After reviewing the documents in camera, the district court found (App. E, *infra*, 23a) that they "encompass opinions by attorneys regarding the evidentiary needs of the Americana action" and that "[t]hey also discuss specific methods of obtaining evidence in that litigation." The court held (*ibid.*) that "the documents [fell] within the rubric of 'mental impressions, conclusions, opinions or legal theories' " under Rule 26(b)(3) of the Federal Rules of Civil Procedure and that they accordingly fell within Exemption 5 of the FOIA.

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[3] The FTC withheld two other documents—Numbers 1 and 2—on the grounds that they were work-product and pre-decisional. Court of Appeals Joint Appendix ("C.A. App.") 60-61. The district court upheld the withholding under the work-product rationale (C.A. App. 113). Grolier subsequently withdrew its claim for disclosure of document 2 (App. A, *infra*, 2a n.3). The court of appeals affirmed the district court's judgment regarding document 1 under the pre-decisional rationale (*id.* at 8a).

The Commission also withheld document 4 as an attorney-client communication (C.A. App. 62). Both the district court and the court of appeals upheld the withholding on this basis (C.A. App. 113-114; App. A, *infra*, 2a n.3).

A divided court of appeals vacated the district court's judgment regarding those four documents. The panel majority conceded that "[t]here is no question that the documents involved were work-product prepared as a part of the *Americana* action" (App. A, *infra*, 2a). However, the majority stated that the applicability of Exemption 5 of the FOIA depended upon "whether these documents continue to be privileged against disclosure several years after the *Americana* suit was terminated" (*ibid.*).

The court below noted (App. A, *infra*, 3a-4a, quoting *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) emphasis added in opinion) that several courts of appeals and district courts had held that "there is 'a *perpetual* protection for work product' extending beyond the termination of the litigation for which the documents were prepared." However, the court concluded (App. A, *infra*, 5a) that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." The court reasoned (*id.* at 6a) that effective legal representation would not be adversely affected by disclosure of attorneys' mental impressions, conclusions, opinions, or legal theories "[w]hen litigation has ended and no potential for related actions exists * * *." Accordingly, the court held (*id.* at 7a; emphasis in original) that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists."

Applying that test to the present case, the court of appeals rejected the suggestion that Grolier's FOIA suit constituted related litigation (App. A, *infra*, 8a) and stated (*id.* at 7a) that "there does not appear to be any suit or potential suit related to the original *Americana* action." The court therefore remanded the case "for

reconsideration of the applicability of the work-product privilege in light of the apparent absence of related litigation" (*id.* at 7a-8a).

Judge MacKinnon dissented. In his view, the Commission properly withheld the requested documents under Exemption 5 "because the termination of the litigation to which the work-product relates does not destroy this privilege" (App. A, *infra*, 9a). Moreover, assuming that the work-product privilege were limited by a "related case" rule, Judge MacKinnon concluded that "the present suit could not be more directly related to the *Americana* litigation" (*id.* at 13a).

The court of appeals subsequently denied the government's suggestion for rehearing en banc by a vote of five to four (App. D, *infra*, 19a-20a).[4]

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the scope of protection afforded by Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to the work-product of government attorneys. The court of appeals' resolution of that question is inconsistent both with this Court's opinion in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), and with the decisions of three other courts of appeals. In addition, it will have a serious adverse impact upon the government's ability to conduct civil and criminal litigation effectively.

1. Exemption 5 of the FOIA protects from disclosure "memorandums or letters which would not be available by law to a party other than an agency in litigation with

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[4] Judges Tamm, MacKinnon, Robb and Ginsburg voted to grant en banc review. Judges Mikva and Bork did not participate in the consideration of the petition (App. D, *infra*, 20a).

the agency." 5 U.S.C. 552(b)(5). This exemption was clearly intended to protect the working papers of government attorneys from disclosure. The Senate Report stated (S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965)) that the material protected by Exemption 5 "include[s] the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." This Court has also noted that it is "clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5." *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 154. See *FOMC* v. *Merrill*, 443 U.S. 340, 353 (1979).

The work-product privilege was first recognized by this Court in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In the context of civil discovery, the privilege protects relevant and otherwise non-privileged material in an attorney's files from his adversaries' discovery requests (see Fed. R. Civ. P. 26(b)(3)). Facts in an attorney's file that are "essential to the preparation of [an adversary's] case" may be discovered only upon a showing of necessity (*ibid.*; see also *Hickman* v. *Taylor*, *supra*, 329 U.S. at 511). However, "[i]n ordering discovery of such materials when the required showing has been made," courts must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney * * * concerning the litigation." Fed. R. Civ. P. 26(b)(3); see also Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C. App., at 442; *Upjohn Co.* v. *United States*, 449 U.S. 383, 399-401 (1981). Because the work-product privilege is qualified, the particular circumstances of the party requesting discovery—for example, the party's needs for the material in preparing his case—are an important factor in determining whether the privilege will be honored. Moreover, in civil discove-

ry, a court may enter a protective order permitting disclosure of work product only to particular persons and "only on specified terms and conditions" (Fed. R. Civ. P. 26(c)(2)).

Under the FOIA, by contrast, such an individualized approach is not possible. The FOIA does not "by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). Instead, the FOIA requires information subject to disclosure to be made "available to any person" (5 U.S.C. 552(a)(3)), and a large percentage of FOIA requests are made by firms and individuals acting in a representative capacity precisely so that the identity of the person, company, or organization seeking the information will not be known. For these reasons, "at best, the discovery rules can only be applied under Exemption 5 by way of rough analogies." *EPA* v. *Mink*, *supra*, 410 U.S. at 86. Accordingly, in *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149, this Court held that "it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context." The Court carefully emphasized (*id.*, at 149 n. 16) that "it is not sensible * * * to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." Rather, the question is whether the information sought would " 'routinely be disclosed' in private litigation" (*ibid.*, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess 10 (1966)).

Applying this teaching to the question presented by the instant case yields a result precisely opposite to that reached by the court of appeals. Of course, if the work-product privilege is perpetual in the context of civil dis-

covery, then work product from terminated litigation would not be available under the FOIA regardless of whether there was any potential for related litigation. But even if, as the court below suggested (App. A, *infra*, 4a), "the work-product privilege extends to subsequent cases only when they are related," it would not follow that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists" (*id.* at 7a; emphasis in original). On the contrary, if work-product from terminated litigation would not be discoverable in a related civil case, because of the absence of a showing of need, then that material would not " 'routinely be disclosed' in private litigation" (*NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149 n.16, quoting H.R. Rep. No. 1497, *supra*, at 10) and it would consequently be unavailable under the FOIA.

Moreover, the test imposed by the court of appeals' decision—whether "litigation related to the terminated actions exists or potentially exists" (App. A, *infra*, 7a)—is ambiguous and unworkable. First, it is far from clear what is meant by "related" litigation. Cases may be related in countless ways. For example, they may involve similar facts; the same or similar investigative techniques, causes of action, or defenses; or the same investigators, trial attorneys, or supervisory personnel. There are also infinite degrees of relatedness. For instance, all cases brought by a particular agency are related in an important sense, and disclosure of work product from an agency's past cases may provide a regulatee or potential litigant with valuable information about the agency's investigative and litigative techniques. Thus, the court of appeals' decision imposes upon the federal agencies and ultimately the courts the difficult task of

determining what sort of relationship is required and just how close the relationship between cases must be to fall within the court of appeals' construction of Exemption 5. Developing those standards is likely to take many years and much litigation, and applying them to the thousands of FOIA requests filed each year will be a truly burdensome chore. Even if it were clear what is meant by "related" litigation, it would still be necessary for those charged with processing FOIA requests to survey all cases pending in all courts in order to determine whether any "related" cases exist.

While the concept of "related litigation" is ambiguous, the concept of litigation that "potentially exists" is meaningless for all practical purposes. In our litigious society, what sort of litigation does not "potentially" exist at any time? In addition, the very fact of a FOIA request seeking information from government litigation files provides some reason for believing that there is a potential for related litigation. Furthermore, the obligation of proving the potential for related litigation might in some circumstances require the government to disclose the existence of sensitive investigations. Indeed, FOIA requests might be filed for the purpose of ascertaining whether any such investigations are then under way.

2. The apparent premise of the court of appeals' ruling—that the work-product privilege terminates unless related litigation exists or potentially exists—is without judicial precedent, unworkable, and contrary to the holdings of all courts of appeals that have decided the question.

The rationale underlying the work-product privilege was set forth in *Hickman* v. *Taylor*, *supra*. The Court recognized (329 U.S. at 511) that allowing the discovery of facts and documents assembled by attorneys in

preparation for litigation would grievously harm the adversary process:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Although *Hickman* was not concerned with an attempt to secure work-product for use in subsequent, unrelated litigation, the courts of appeals that have reached this issue have all recognized that the *Hickman* rationale remains applicable when work-product from terminated litigation is sought through discovery in a subsequent case. *In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1977) ("The mischief engendered by allowing discovery of work product recognized in *Hickman* would apply with equal vigor to discovery in future, unrelated litigation"); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484 n.15 (4th Cir. 1973) (the conclusion that the work-product privilege survives "only if the two cases are 'closely related' * * * is incompatible with the essential basis of the *Hickman* decision"); *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975); *Duplan Corp.* v. *Deering Milliken, Inc.*, 540 F.2d 1215, 1219 (4th Cir. 1976); *United States* v. *Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977). In all, five decisions by three different Circuits (the Fourth, Sixth, and Eighth) have concluded that the work-product privilege remains in force after the conclusion of the litigation for which the material was pre-

pared and without regard to the existence or potential existence of related litigation.[5]

The reasoning of the court below in refusing to follow the prior decisions of three other circuits is also unsound. While acknowledging that disclosure of work-product assembled for pending litigation would have deleterious effects, the court reasoned (App. A, *infra*, 6a) that "[w]hen litigation has ended and no potential for related actions exists, concerns about possible inroads on the integrity of the adversary system greatly diminish." The court thus agreed that an attorney will hesitate to commit matters to writing if they may be used against him by his immediate adversary, but it believed that the attorney will have no such inhibitions if the same materials may be used against him by a future adversary in an "unrelated" case. This is not sensible. Rather, as the Fourth, Sixth, and Eighth Circuits have recognized, if work-product prepared in connection with terminated litigation were freely discoverable in subsequent, "unrelated" litigation, much of what the Court sought to prevent in *Hickman* would take place. Attorneys would be more reluctant to amass materials that reflect unfavorably upon their clients for fear that those materials might be used to their clients' disadvantage in subsequent litigation or in some

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[5] Moreover, the perpetual nature of the work-product privilege is an implicit premise of this Court's analysis in *NLRB* v. *Sears, Roebuck & Co.*, *supra*. In that case, Sears filed a FOIA request seeking, among other things, intra-agency memoranda of the NLRB directing the filing of a complaint. Many such memoranda pertained to "cases which had been closed * * * because litigation before the Board had been completed" (421 U.S. at 145). However, the Court did not distinguish between open cases and closed cases but rather concluded (*id.* at 159-160) that all such memoranda had been "prepared in contemplation of the upcoming litigation [and therefore fell] squarely within Exemption 5's protection of an attorney's work product."

other way. Attorneys would be hesitant to commit to writing candid judgments that might cause them personal embarrassment if later disclosed. And potentially valuable files might be destroyed in many instances for the purpose of avoiding such disclosures.

The rule adopted by the court below would have a particularly adverse and demoralizing effect on government attorneys. The working papers of government attorneys would be subject to disclosure, not only in civil discovery, but under the FOIA as well. Yet government attorneys are far more dependent upon the existence of comprehensive written files than most of their counterparts in private practice: government cases tend to be larger and to last longer; government attorneys tend to be more transient; coordination of the positions taken in many varieties of cases is of unusual importance; and maintaining supervision and coordination in an organization as vast and complex as the United States government naturally requires great reliance upon past records. If the decision below is permitted to stand "much of what is now put down in writing would remain unwritten" (*Hickman* v. *Taylor*, *supra*, 329 U.S. at 511), and both the quality and consistency of government litigation is likely to suffer.

The court of appeals attempted to bolster its conclusion by relying upon what it characterized as a "substantial body of case law [that] supports the conclusion that the work-product privilege extends to subsequent cases *only when* they are related" (App. A, *infra*, 4a; emphasis added). However, none of the cases cited by the court reached that question. In each of those cases, the court declined to permit the discovery of attorney work-product in a subsequent, related case. See *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967); *Hercules, Inc.* v. *Exxon Corp.*, 434 F.Supp. 136,

153 (D.Del. 1977); *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 275 F.Supp. 146, 148 (E.D.Pa. 1967). Indeed, none of the cases even contains dictum embracing the court of appeals position.[6]

The remainder of the court of appeals' analysis is equally unpersuasive. The court stated (App. A, *infra*, 5a) that "[e]xtending the work-product protection only to subsequent related cases best comports with the fact that the privilege is qualified, not absolute." But simply because the privilege is qualified in one respect—*i.e.*, some privileged materials may be obtained in civil discovery where sufficient need is shown (see Fed. R. Civ. P. 26(b)(3))—it does not follow that the privilege must be qualified in every other respect as well. In other words, just because a court may conclude in a particular case that a litigant's need for privileged materials justifies disclosure, it does not follow that the interests served by the privilege lose all force "[w]hen litigation has ended and no potential for related actions exists" (App. A, *infra*, 6a). As we have explained (see pages 12-13, *supra*), those interests remain important.

Finally, the court observed (App. A, *infra*, 6a; emphasis in original):

> [W]e deal in this case, *not* with the civil discovery situation, but rather with a Freedom of Information Act request. Here, the presumption in favor of disclosure is at its zenith.

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[6] In *Republic Gear Co.*, the Second Circuit simply distinguished the case before it, which involved an attempt to obtain work-product from related cases pending on appeal, from district court cases involving work-product from completed litigation (381 F.2d at 557 & n.5). The three district court cases hold that work-product from previous, related cases is not discoverable. Those cases do not state that work-product from previous, unrelated cases is discoverable.

If the court meant by this statement to suggest that work-product privileged in civil discovery is nevertheless available under the FOIA despite Exemption 5, then the court's decision squarely contravenes both the plain language and legislative history of Exemption 5 and its construction by this Court (see *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149; *FOMC* v. *Merrill*, *supra*, 443 U.S. at 353).

3. The court of appeals' decision will prove particularly burdensome for the government because every withholding of agency records under the FOIA may be challenged in the District of Columbia Circuit. See 5 U.S.C. 552(a)(4)(B). Indeed, Department of Justice figures reveal that 38% of the FOIA suits brought in 1981 were filed in that Circuit.[7] Hence, the government cannot easily afford to await further development of this issue in other circuits. In these circumstances, this Court should grant review to consider whether the FOIA mandates the disclosure of vast quantities of the work-product of government attorneys.

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[7] A panel of the District of Columbia Circuit recently followed *Grolier* and remanded a FOIA suit to the district court to determine whether certain documents satisfied the *Grolier* test (*Moody* v. *IRS*, No. 81-2142 (D.C. Cir. June 25, 1982)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1982